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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

KALEB M., Appellant, v. GREGORY S., MARTHA S., and MICHAEL M., Appellees.	2 CA-JV 2008-0056 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF GRAHAM COUNTY

Cause No. SV-20070004

Honorable D. Corey Sanders, Judge Pro Tempore

AFFIRMED

David Griffith
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By Travis W. Ragland
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Attorneys for Appellees

B R A M M E R, Judge.

¶1 Kaleb M. appeals from the juvenile court's February 2008 order terminating his parental rights to his five-year-old son, Michael M. The court ordered termination on the ground that Kaleb's sentence to imprisonment for a felony conviction was sufficiently long that Michael would have been deprived of a normal home for a period of years. *See* A.R.S. § 8-533(B)(4). On appeal, Kaleb contends the court erred by basing its decision on the length of his imprisonment alone, without considering other relevant factors identified in *Michael J. v. Arizona Department of Economic Security*, 196 Ariz. 246, ¶ 29, 995 P.2d 682, 687-88 (2000). He also maintains the court failed to "recite the findings on which the order [was] based" as required by A.R.S. § 8-538(A).

¶2 In this private severance proceeding, Martha and Gregory S., Michael's paternal grandmother and step-grandfather, his legal custodians since August 31, 2006, filed a petition to terminate the parental rights of both of Michael's parents. After Martha and Gregory testified on the first day of the termination hearing, Michael's mother, Miranda K., admitted the allegations in the petition and voluntarily relinquished her rights to him. The hearing was then continued and reconvened several months later.[1] At the continued hearing, the juvenile court announced that no transcript was available from the first day of testimony, apparently because of a problem with the court's recording system.

[1]Although Kaleb maintains the juvenile court "held two separate termination adjudication hearings," the record does not support this characterization.

¶3 After the hearing, the juvenile court found that Kaleb "has been incarcerated for a period in excess of two (2) years and that he is presently incarcerated for an indeterminate amount of time" and that "this has deprived Michael . . . of a normal home life with the father for a period of at least two (2) years," warranting termination of Kaleb's parental rights pursuant to § 8-533(B)(4). Kaleb does not dispute the court's finding with respect to the length of his sentence. Rather, relying on *Michael J.*, he argues the court's decision was deficient because it was based on that factor alone.

¶4 In *Michael J.*, the supreme court noted that § 8-533(B)(4) "sets out no 'bright line' definition of when a sentence is sufficiently long" to warrant termination and stated that a juvenile court

> should consider all relevant factors, including, but not limited to: (1) the length and strength of any parent-child relationship existing when incarceration begins, (2) the degree to which the parent-child relationship can be continued and nurtured during the incarceration, (3) the age of the child and the relationship between the child's age and the likelihood that incarceration will deprive the child of a normal home, (4) the length of the sentence, (5) the availability of another parent to provide a normal home life, and (6) the effect of the deprivation of a parental presence on the child at issue.

196 Ariz. 246, ¶ 29, 995 P.2d at 687-88.

¶5 Kaleb argues the juvenile court's comments at the close of the hearing suggest it had failed to consider these factors. Specifically, Kaleb calls the following remarks to our attention:

> It does seem clear to the court that the amount—the length of incarceration has exceeded two years. Case law does define the period of years as a minimum of two. I don't believe that there is any—any way around this ground, and will find that the petitioners have met their burden by clear and convincing evidence that Kaleb . . . has been deprived of his civil—civil liberties because of the conviction of a felony . . . [and] he has been incarcerated for more than two years and that has deprived Michael . . . of a normal home with the father for a period of at least two years. And so that ground has been met.

¶6 Martha and Gregory contend the juvenile court heard and considered evidence relevant to each of the factors identified in *Michael J.*, including testimony on the first day of the hearing that Kaleb had failed to maintain regular contact with Michael and that Michael had required counseling to address emotional trauma he exhibited after speaking with Kaleb.[2] They further contend this evidence was sufficient to support the court's ruling.

¶7 According to Martha and Gregory, the juvenile court's ruling sufficiently identified the facts necessary to find that the § 8-533(B)(4) ground had been established, and

[2]Kaleb has filed no reply brief challenging Martha's and Gregory's characterization of the testimony received on the first day of the termination hearing. Moreover, because the record contains no transcript or other evidence of that testimony, we presume it supports the court's decision. *See State v. Zuck*, 134 Ariz. 509, 513, 658 P.2d 162, 166 (1982) ("Where matters are not included in the record on appeal, the missing portions of the record will be presumed to support the action of the trial court."). We appreciate that the hearing transcript was unavailable through no fault of the parties. But Rule 11(c), Ariz. R. Civ. App. P., has been incorporated in the rules governing juvenile court procedure, *see* Ariz. R. P. Juv. Ct. 103(G), and provides a remedy for unavailable transcripts, whatever the cause, and a procedure for filing "a narrative statement of the evidence or proceedings from the best available means, including the appellant's recollection." Accordingly, we conclude the rule announced in *Zuck* applies when the record contains neither a transcript nor a narrative statement filed pursuant to Rule 11(c).

we should affirm that finding because it is supported by reasonable evidence and is not clearly erroneous. *See Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002). Kaleb contends the court erred in its interpretation of § 8-533(B)(4) and that we should review the court's decision de novo, relying on *State v. Kelly*, 210 Ariz. 460, ¶ 3, 112 P.3d 682, 683 (App. 2005).

¶8 A juvenile court may terminate parental rights if it finds the existence of any statutory ground for severance by clear and convincing evidence and if it finds by a preponderance of the evidence that severance is in the child's best interests. A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005); *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, ¶ 25, 971 P.2d 1046, 1051 (App. 1999). We view the evidence in the light most favorable to upholding the court's factual findings. *See Michael J.*, 196 Ariz. 246, ¶ 20, 995 P.2d at 686. "But we review issues of law, including 'a juvenile court's interpretation of a statute[,] de novo.'" *Bobby G. v. Ariz. Dep't of Econ. Sec.*, No. 2 CA-JV 2008-0009, ¶ 1, 2008 WL 4415149 (Ariz. Ct. App. Sept. 30, 2008), *quoting Kimu P. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 39, ¶ 13, 178 P.3d 511, 515 (App. 2008).

¶9 Although we are somewhat troubled by the court's statements emphasizing the length of Kaleb's sentence, and although the record would have been strengthened if the court had made specific findings on the factors set forth in *Michael J.*, the court's statements do not show it misapplied the law. Judges "are presumed to know the law and to apply it

in making their decisions." *Walton v. Arizona*, 497 U.S. 639, 653 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002). Further, we agree with Martha and Gregory that other statements by the court reflected its consideration of Kaleb's inability to nurture Michael and of testimony that the relationship between this father and son had been "severely strained." The court commented that Michael was "about five" years old, that Martha and Gregory had acted as his sole caretakers for more than two years, and that Miranda had voluntarily relinquished her parental rights.[3] These comments suggest the court had considered evidence relevant to the *Michael J.* factors before rendering its decision.

¶10 Moreover, Kaleb did not address the factors found in *Michael J.* or request specific findings on those factors at the termination hearing. As our supreme court has explained:

> Because a trial court and opposing counsel should be afforded the opportunity to correct any asserted defects before error may be raised on appeal, absent extraordinary circumstances, errors not raised in the trial court cannot be raised on appeal. . . . If the court has failed to make findings and a party wants them, all one has to do is to make that issue known in the trial court. . . . [B]y failing to act at all, a litigant is not in the position to complain about how helpful findings would have been on appeal.

[3]Miranda's relinquishment of parental rights would necessarily have rendered her, as Michael's other parent, unavailable "to provide a normal home life" for him. *Michael J.*, 196 Ariz. 246, ¶ 29, 995 P.2d at 687-88.

Trantor v. Fredrikson, 179 Ariz. 299, 300-01, 878 P.2d 657, 658-59 (1994) (citations omitted). Although specific findings on the *Michael J.* factors might have been helpful to our review of Kaleb's claim, he did not request them. For the same reason, we conclude he has waived his argument that the juvenile court's written findings were insufficient under § 8-538(A). *See Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, ¶ 21, 153 P.3d 1074, 1081 (App. 2007) ("alleged lack of detail in the juvenile court's findings" waived by parent's failure to raise below); *cf. Bayless Inv. & Trading Co. v. Bekins Moving & Storage Co.*, 26 Ariz. App. 265, 271, 547 P.2d 1065, 1071 (1976) (party may not "sit back and not call the trial court's attention to the lack of a specific finding on a critical issue, and then urge on appeal th[e] mere lack of a finding on that critical issue as a ground[] for reversal").[4]

¶11 Additionally, like the court in *Christy C.*, we conclude that, even if the juvenile court's findings were deficient, reversal still is not required. *See Christy C.*, 214 Ariz. 445, n.5, 153 P.3d at 1081 n.5. Although a party who fails to object to omissions in a court's findings of fact may not challenge the adequacy of those findings on appeal, he or she may still argue the evidence and permissible inferences, considered in the light most

[4]We note that the juvenile court had asked Kaleb if he wished to have a proposed termination order lodged, presumably to afford him an opportunity to review the order and file any objections before it was signed. *Cf.* Ariz. R. Civ. P. 58(d) (opposing party may object to proposed form of order within five days after service). Having declined that opportunity, Kaleb is precluded from challenging the adequacy of the court's order on appeal. *Cf. Bayless Inv. & Trading Co.*, 26 Ariz. App. at 270-71, 547 P.2d at 1070-71 (party who fails to use opportunity to request amendment or additional findings relevant to preliminary injunction may not appeal on ground findings inadequate).

favorable to sustaining the court's decision, were insufficient to support the court's decision. *Bayless Inv. & Trading Co.*, 26 Ariz. App. at 270-71, 547 P.2d at 1070-71. But Kaleb's only reference to the sufficiency of the evidence is his statement, as an alternative standard of review, that this court will reverse a termination order only when it is clearly erroneous and no reasonable evidence in the record supports it. *See Jesus M.*, 203 Ariz. 278, ¶ 4, 53 P.3d at 205. He does not argue the evidence was insufficient to establish the criteria for termination under § 8-533(B)(4) or to support the juvenile court's best interests findings, and he has therefore waived our consideration of this issue. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Novak*, 167 Ariz. 363, 370, 807 P.2d 531, 538 (App. 1990) (declining to consider legal issue not supported by authority or argument).

¶12 For the foregoing reasons, we affirm the juvenile court's order terminating Kaleb's parental rights to Michael.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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JOSEPH W. HOWARD, Presiding Judge